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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 923

JANICE WIENER, as Executrix of the Estate of Norton Wiener, Deceased, and Related Cases,

Petitioners,

vs.

UNITED AIR LINES, INC.,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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vs.

UNITED AIR LINES, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The judgment reversed an order of the United States District Court for the Southern District of California which had consolidated for trial, on the issue of liability only, twenty-three actions for wrongful death arising from a common air disaster.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported. It is set forth as Appendix A to this petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on January 16, 1961. Petitioners filed a timely petition for rehearing on February 8, 1961. The petition for rehearing was denied by the Court of Appeals on February 15, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented.

Whether a U. S. District Court has the discretion under Rule 42 of the Federal Rules of Civil Procedure to consolidate actions for wrongful death arising out of a common air disaster on the issue of liability only, where compensatory but not exemplary damages are sought by the plaintiffs.

Federal Rule Involved.

Rule 42 of the Federal Rules of Civil Procedure provides:

> *"Consolidated; separate trials.—(a) Consolidation.*
>
> "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.
>
> "(b) *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

Statement.

On April 21, 1958, near Las Vegas, Nevada, a United Air Lines DC-7 collided in mid-air with an F-100F military jet owned by the United States and operated by Air Force personnel. All persons in both airplanes were killed. [R. 292-302.]

Twenty-three separate actions for wrongful death were filed in the United States District Court for the Southern District of California, Central Division, by heirs or personal representatives of persons aboard the United Air Lines plane. In all cases United Air Lines, Inc., (hereinafter referred to as United) and the United States were joined as defendants. [R. 7-291.] Jurisdiction against United is based upon diversity of citizenship, 28 U. S. C. §1332, and against the United States upon the Federal Tort Claims Act, 28 U. S. C. §1346(b).

In each of the twenty-three cases United filed an answer and a demand for jury trial. [R. 7-291.] The claims against the United States are, under the Tort Claims Act, triable to the court. 28 U. S. C. §2402. After all the cases were at issue and upon motion of the United States, District Judge Peirson M. Hall, exercising his discretion under Rule 42, signed an order in all twenty-three cases which provided *inter alia* as follows:

> "(1) That all of the above entitled cases be consolidated on the issue of liability only. . . .
>
> "(2) That all of the above entitled cases, so consolidated, shall be jointly tried in a separate trial as to liability only, and